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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 926

PITTSBURGH RAILWAYS COMPANY, a Pennsylvania corporation, Petitioner

v.

DUQUESNE LIGHT COMPANY, a Pennsylvania corporation, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

For twenty-five years petitioner, Pittsburgh Railways Company, and its predecessor corporation of the same name paid respondent, Duquesne Light Company the rent reserved in the lease of June 5, 1933 (R. 52a).*

*R. with page numbers followed by the letter "a" designates the page in the printed record on the appeal to the Supreme Court of Pennsylvania at No. 27 March Term, 1963.

Beginning April 1, 1958, petitioner stopped paying (R. 41a), and on December 31, 1958 respondent entered judgment in the Court of Common Pleas of Allegheny County, Pennsylvania, for nine months rent under the warrant of attorney contained in the lease (R. 1a, 54a).

Petitioner's refusal to pay was based upon the assertion that because the periods for amortizing the leased properties on respondent's books (which had been orally discussed in the negotiations leading up to the execution of the lease but were not set forth in the written document) had expired, petitioner was no longer required to pay the component (also not set forth in the writing) of the rent intended to provide a return to Duquesne for amortization (R. 8b).* Later, petitioner also contended that it was entitled to a refund of $417,067 for overpayments (R. 37a-38a, 208a-225a, Ex. R-23,** 237a-239a, Ex. R-26).

Petitioner asserted that its contention gave rise to a dispute, and that it was entitled to have the dispute determined by arbitrators appointed pursuant to the arbitration clause of the lease (R. 3b, 9b). On petitioner's motion, and over respondent's objection, the Court of Common Pleas opened the judgment and directed the parties to submit the dispute to arbitration (R. 13b). This action was affirmed by the Supreme Court of Pennsylvania on June 30, 1960 (400 Pa. 565, 162 A.2d 350).

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*R. with page numbers followed by the letter "b" designates the page in the printed supplemental record on the appeal to the Supreme Court of Pennsylvania at No. 26 March Term, 1963.

**Ex. R- followed by a number designates a Railways exhibit so numbered in the printed record (Vol. II) on the appeal to the Supreme Court of Pennsylvania at No. 27 March Term, 1963.

After trial, the arbitrators on January 6, 1962 decided in favor of Duquesne (R. 416a-424a), and on September 5, 1962 their action was affirmed by the Court of Common Pleas (R. 459a-484a), which discharged the previously-granted rule and dismissed Railways' petition to open the judgment (R. 484a).

Three weeks later, on September 25th, Railways presented a second petition to open the judgment entered December 31, 1958 (R. 26: 1a, 3a-10a),* this time on the entirely new ground that the lease under which it had succeeded in having its defense and its claim for overpayments submitted to and heard by arbitrators was invalid and had never become effective in the first place, because of Duquesne's alleged failure to file it with the Pennsylvania Public Service Commission and its successor, the Pennsylvania Public Utility Commission, and because of Duquesne's failure to obtain a certificate of public convenience from either of those two bodies. On the same day, after argument, the Court of Common Pleas dismissed the petition (R. 26: 26a), refusing to grant a rule to show cause. An opinion in support of this action was filed December 3, 1962 (111 P.L.J. 165).

Railways appealed to the Supreme Court of Pennsylvania from the order of September 25th (appeal at No. 26 March Term, 1963) as well as from the order of September 5th (appeal at No. 27 March Term, 1963). After argument, the Supreme Court affirmed both orders in one opinion (413 Pa. 1). Railways then filed a petition for reargument (Appendix to Petition for Certiorari, pp. 13-26), which was refused. The present Petition for Certiorari followed.

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*R. 26 with page numbers followed by the letter "a" designates the page in the printed record on the appeal to the Supreme Court of Pennsylvania at No. 26 March Term, 1963.

ARGUMENT

I. Inconsistency of Application of a State Statute Raises No Federal Question.

Petitioner asks for certiorari under the Act of Congress of June 25, 1948 c.646 (62 Stat. 869) section 1257(3) (28 U.S.C. § 1257(3)), which authorizes the issuance of such writ "where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." The state statute which petitioner asserts is involved is article III, section 3 of the Pennsylvania Public Service Company Law of July 26, 1913 P.L. 1374, at page 1388. That statute was in effect when the lease was made, but has subsequently been repealed by the Pennsylvania Public Utility Law of May 28 P.L. 1053, section 1502 (1937 P.L. at p. 1118).

Petitioner has not brought itself within the statutory provision upon which it relies to obtain review of the decision below. Petitioner is not questioning the validity of the Pennsylvania statute. On the contrary, petitioner's contention is based on the assumption* that the statute is valid.

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*Petitioner overlooks the earlier decision of the Superior Court of Pennsylvania (the court to which appeals from the Public Utility Commission are taken) holding that such a statutory provision is unconstitutional if not restricted to property used or useful in the public service: *N. Pa. Power Co. v. Pa. P.U.C.*, 132 Pa. Superior Ct. 178, 200 Atl. 866 (1938), reversed on other grounds 333 Pa. 265, 5 A.2d 133 (1939). The record in the case at bar is bare of any allegation that the property subject to the lease was used or useful by respondent in rendering electric service to the public. On the contrary,

Argument.

Petitioner's contention is not that the statute is invalid, but that it is valid and that the court below erred in not applying it to strike down the lease between the parties. Petitioner asserts that the failure of the court below to apply article III, section 3 of the statute so as to invalidate the lease in suit was inconsistent with the same court's earlier application* of another, allegedly analogous, although differently-worded, section of the same statute (article III, section 11, at p. 1395) providing that no contract between any public service company and any municipal corporation should be valid unless approved by the Commission.

Even on the assumption that the two sections of the Public Service Company Law of 1913 were sufficiently alike to render the decision here sought to be reviewed in conflict with the earlier decision, such inconsistency does not deny petitioner the equal protection of the laws. Inconsistency of a state court in construing a state statute or in applying the common law of the state does not violate the federal constitution.

Beck v. Washington, 369 U. S. 541 (1962).

In the case cited, the Court in affirming the conviction of a criminal in a state court said with respect to the scope

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the second petition to open the judgment averred (¶3, R.26: 3a-4a) that the equipment was "used for converting electric power supplied by plaintiff [respondent] to the [leased] substations to voltages appropriate for use in operating streetcars of defendant [petitioner]." The operation of streetcars, or the conversion of power to voltages appropriate for use in such operation, was not asserted to be part of respondent's electric service to the public.

*In *Carnegie Nat. Gas Co. v. Allegheny Co.*, 406 Pa. 134, 176 A.2d 630 (1962).

of the fourteenth amendment as related to the decisions of state courts, speaking through Mr. Justice Clark (pp. 554-5):

> ". . . the petitioner's argument here comes down to a contention that Washington law was misapplied Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .' *Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee,* 252 U.S. 100, 106 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.".

The above rule is but a specific application of the general and unquestioned principle that the overruling of a former decision does not violate the fourteenth amendment: *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 450 (1924). If in the present case the Supreme Court of Pennsylvania had overruled its prior, allegedly conflicting decision, petitioner would, under that principle, have no valid basis for complaint. For the same reasons, it can have none if the court below, instead of overruling its earlier holding, simply ignored it.

II. The Asserted Federal Question Was Not Raised Seasonably.

Petitioner correctly states (Petition for Certiorari, p. 6) that the asserted federal question was first raised in its Petition for Reargument in the Supreme Court of Pennsylvania. Petitioner seeks to excuse it tardiness with the argument that it could not reasonably have anticipated that the Supreme Court of Pennsylvania would rule contrary to its prior decisions.

It is hornbook law that, except in a few exceptional situations, a federal question first raised on petition for rehearing comes too late.

> *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

In that case the Court in dismissing a petition for certiorari based on a federal ground raised for the first time in the petition for reargument in the state court, said through Mr. Justice Brandeis (pp. 163-4):

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. *The contention that a federal right had been violated rests on the action of the trial court* in entering judgment without giving notice and an opportunity to be heard." (Emphasis supplied).

Conclusion.

The above statement of Mr. Justice Brandeis is precisely applicable to the case at bar. Any deprivation of petitioner's constitutional rights did not originate in the Supreme Court of Pennsylvania, which merely affirmed the order of the Court of Common Pleas. If any constitutional question exists in this litigation, it has been present ever since the judgment was first entered against petitioner in the Court of Common Pleas on December 31, 1958, or, at the latest, when that court refused petitioner's second petition to open that judgment on September 25, 1962. Petitioner had ample opportunity to raise any and all of its defenses, including those involving the federal constitution, in its original petition to set aside the judgment, filed January 8, 1959, in its amendment to that petition filed October 30, 1959, in its new petition to open the judgment filed September 25, 1962, and in its appeal from the trial court's dismissal of that petition. Petitioner's failure to take advantage of all these opportunities cannot be blamed on the Supreme Court of Pennsylvania.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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